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No. 02-915

In the Supreme Court of the United States

ROBERT R. KRILICH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the private parties to a consent decree, entered in 1992 to settle a civil enforcement action for the alleged filling of wetlands without a permit in violation of the Clean Water Act (CWA), are entitled to reopen the decree in light of this Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	11
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Community Ass'n for Restoration of the Env't v. *Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002)	15
Headwaters, Inc. v. *Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001)	15
Hoffman Homes, Inc. v. *Administrator, United States Envtl. Prot. Agency*:	
961 F.2d 1310 (7th Cir. 1992)	5
975 F.2d 1554 (7th Cir. 1992)	5
999 F.2d 256 (7th Cir. 1993)	5, 6
New Hampshire v. *Maine*, 532 U.S. 742 (2001)	12
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)	11
Rice v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001)	14, 15
Rufo v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)	10, 11
Solid Waste Agency of No. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001)	3
United States v. *Interstate Gen. Co., L.P.*, 39 Fed. Appx. 870 (4th Cir. 2002)	13

Cases—Continued: Page

United States v. *Krilich*:
126 F.3d 1035 (7th Cir. 1997) 6
209 F.3d 968 (7th Cir.), cert. denied, 531 U.S. 992 (2000) 8, 12
948 F. Supp. 719 (N.D. Ill. 1996) 6, 13
No. 92 C 5354, 1999 WL 182333 (N.D. Ill. Mar. 25, 1999) 7
United States v. *Lopez*, 514 U.S. 549 (1995) 7
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 3
United States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) 7, 13

Constitution, statutes, regulations and rules:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 7
Clean Water Act, 33 U.S.C. 1251 *et seq.*:
33 U.S.C. 1251(a) 2
33 U.S.C. 1251(a)(2) 2
33 U.S.C. 1311(a) 2
33 U.S.C. 1344 (§ 404) 2, 3, 13, 14
33 U.S.C. 1344(b) 2
33 U.S.C. 1344(c) 2
33 U.S.C. 1362(7) 2
33 U.S.C. 1362(12)(A) 2
33 C.F.R.:
Section 328.3(a) 2
Section 328.3(a)(1) 2
Section 328.3(a)(2) 2
Section 328.3(a)(3) 2
Section 328.3(a)(5) 2
Section 328.3(a)(7) 2
40 C.F.R.:
Section 230.3(s) 2
Section 230.3(s)(1) 2
Section 230.3(s)(2) 2
Section 230.3(s)(3) 3

Regulations and rules—Continued: Page

Section 230.3(s)(5) 2
Section 230.3(s)(7) 2
Fed. R. Civ. P.:
Rule 60(b) 11
Rule 60(b)(4) 7, 8
Rule 60(b)(5) 7, 9, 10, 11, 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 303 F.3d 784. The opinion of the district court (Pet. App. 17a-33a) is reported at 152 F. Supp. 2d 983.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2002. The petition for a writ of certiorari was filed on December 9, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act (Clean Water Act or CWA) in 1972 "to restore and maintain the chemical, physical and biologi-

cal integrity of the Nation's waters." 33 U.S.C. 1251(a). One of the primary goals of the CWA is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. 1251(a)(2). A major tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The Act provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

Discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to Section 404 of the CWA, 33 U.S.C. 1344. The Corps and the Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c). The two agencies have promulgated identical regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). That definition encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); interstate waters, including interstate wetlands, 33 C.F.R. 328.3(a)(2), 40 C.F.R. 230.3(s)(2); the "tributaries" of interstate or traditional navigable waters, 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to any of the above categories of waters, 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7). In addition, the regulatory definition of "waters of the United States" encompasses "[a]ll other waters * * * the use, degradation, or destruc-

tion of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3), 40 C.F.R. 230.3(s)(3).

This Court has construed the scope of the geographic reach of the CWA on two occasions. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985), the Court concluded that the "Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.'" In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that the Corps could not properly exercise regulatory authority over a series of isolated, intrastate, nonnavigable ponds, based on their use as habitat for migratory birds. *Id.* at 174.

2. a. On August 7, 1992, the United States filed an enforcement action under the CWA in federal district court, alleging that petitioners had unlawfully discharged fill material into wetlands without obtaining a Section 404 permit. Pet. App. 2a. The parties subsequently lodged a proposed consent decree with the district court. In October 1992, the district court granted the parties' joint motion to enter the consent decree (with certain minor amendments not relevant here) and retained jurisdiction over the case pursuant to the terms of the decree. See *id.* at 4a-5a. *Inter alia*, the decree required petitioners to undertake remediation and mitigation activities, including creation of replacement wetlands, and to pay fines for the prior filling of wetlands. *Id.* at 4a.

The consent decree specifically reflected the parties' agreement as to which wetland areas were properly

regarded as "waters of the United States" within the meaning of the CWA. The decree stated:

V. WATERS OF THE UNITED STATES

17. For purposes of this Consent Decree, *the parties shall treat wetlands and open water areas depicted on Exhibit 1*, together with the new wetland and open water area created pursuant to Part VII (injunctive relief) and depicted on Exhibit 2, *as waters of the United States* located on the Royce Renaissance Property.

* * * * *

20. The boundaries depicted in Exhibit[] 1 * * * *shall bind the parties for the life of this Consent Decree* unless and until a new Corps or EPA delineation is made pursuant to the final version of a revised wetland delineation manual.[1] * * * *

20A. The Defendants shall continue to treat wetland and open water areas depicted on Exhibit 1 as waters of the United States until the mandate issues in Hoffman Homes, Inc. v. EPA, No. 90-3810 (7th Cir. April 20, 1992) and until proceedings related to any appeal, petition for certiorari, or remand are completed. Following completion of these proceedings, *unless pertinent portions of the Seventh Circuit's April 20, 1992 decision are reversed, Exhibit 1 areas W2A, W2B, W3, W5B and W9 shall be excluded from the obligations imposed in Paragraph 17.*

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[1] Neither agency has issued a revised wetlands delineation manual.

Pet. App. 38a-39a (emphases added). "Thus, the parties expressly excluded some waters on the defendant's property and agreed to treat the rest of the waters as 'waters of the United States.'" *Id.* at 4a.

b. In *Hoffman Homes, Inc.* v. *Administrator, United States Environmental Protection Agency*, 961 F.2d 1310 (7th Cir. 1992) (*Hoffman Homes I*), the court of appeals held that intrastate, nonnavigable, isolated waters are not "waters of the United States" within the meaning of the CWA, and that EPA had exceeded its authority under the Act by asserting regulatory jurisdiction over such areas. See *id.* at 1316; Pet. App. 2a-3a. The specific wetlands and open water areas identified in Paragraph 20A (*i.e.*, "Exhibit 1 areas W2A, W2B, W3, W5B and W9") consisted of those aquatic areas on petitioners' property that the parties agreed were "isolated" and would therefore be excluded from CWA coverage in light of *Hoffman Homes I*. See Gov't C.A. Supp. App. 107.

In September 1992, the court of appeals granted the government's petition for rehearing in *Hoffman Homes*, vacated the original panel opinion, and remanded for settlement negotiations. See 975 F.2d 1554 (7th Cir. 1992). The parties to the present case nevertheless retained Paragraph 20A in the final version of the decree entered in October of that year. See Pet. App. 12a, 39a. Settlement negotiations in *Hoffman Homes* proved unsuccessful, and in July 1993, the Seventh Circuit issued an amended opinion. See *Hoffman Homes, Inc.* v. *Administrator, United States Environmental Protection Agency*, 999 F.2d 256 (1993) (*Hoffman Homes II*). The court in *Hoffman II* ruled against EPA, but on narrower grounds than in *Hoffman Homes I*. The court found insufficient evidence to support the government's contention that the isolated

wetland at issue provided "suitable or potential habitat for migratory birds." *Id.* at 261-262. The court therefore did not decide whether use of isolated waters by migratory birds would constitute a sufficient basis for the exercise of federal regulatory authority under the CWA. See *id.* at 262-263 (Manion, J., concurring in judgment).

c. In September 1995, after petitioners failed to meet the consent decree's deadlines for creating replacement wetlands, the government moved to enforce the decree. The district court ordered petitioners to comply with the consent decree and imposed civil penalties of approximately $1.3 million pursuant to Paragraph 55 of the decree (Pet. App. 52a-53a), which stipulated the amount of penalties to be assessed in the event of a violation. See *United States* v. *Krilich*, 948 F. Supp. 719 (N.D. Ill. 1996) (*Krilich I*). However, the district court rejected the government's contention that petitioners had violated the decree by discharging fill material into Exhibit 1 area W9. Paragraph 20A of the consent decree provided that, upon completion of the proceedings in *Hoffman Homes*, petitioners' obligations under the decree would not extend to area W9 unless "pertinent portions" of the Seventh Circuit's decision in *Hoffman Homes I* had been "reversed." Pet. App. 39a; see p. 4, *supra*. The district court in *Krilich I* held that the "pertinent portions" of *Hoffman Homes I* had not been "reversed" within the meaning of Paragraph 20A when the panel opinion was vacated and superseded by *Hoffman Homes II*. *Krilich I*, 948 F. Supp. at 725; see Pet. App. 5a-6a.

The court of appeals affirmed the judgment of liability but remanded for a downward adjustment of the penalty amount to $1,257,500. See *United States* v. *Krilich*, 126 F.3d 1035 (7th Cir. 1997) (*Krilich II*). On

December 15, 1997, the district court entered a modified judgment against petitioners. Pet. App. 18a.

d. In November 1998, petitioners moved to bar enforcement of the stipulated penalty. *United States* v. *Krilich*, No. 92 C 5354, 1999 WL 182333 (N.D. Ill. Mar. 25, 1999) (*Krilich III*); see Pet. App. 18a. Petitioners argued that the district court lacked jurisdiction to enforce the consent decree because the wetlands on petitioners' property were not "waters of the United States" under the CWA and were beyond the scope of federal regulatory authority under the Commerce Clause. See *Krilich III*, 1999 WL 182333, at *1-*2. Petitioners also contended that the consent decree should be vacated in light of a "change in the law" reflected in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997). See *Krilich III*, 1999 WL 182333, at *3. The district court rejected petitioners' claims, ruling that petitioners were not entitled to relief under Federal Rule of Civil Procedure 60(b)(4) or (5).[2] See *Krilich III*, 1999 WL 182333, at *3.[3]

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[2] Under Rule 60(b)(4) and (5), a district court may "relieve a party * * * from a final judgment, order, or proceeding" where "(4) the judgment is void" or "(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(4) and (5).

[3] In rejecting petitioners' collateral attack on the consent decree, the district court noted, *inter alia*, that:

> The jurisdictional issue that is now raised could have been raised by [petitioners] at the time *Krilich I* was being litigated. More importantly, there is nothing in the Decree nor any other pleadings filed prior to [petitioners'] present motion that makes it apparent that the mitigation plan may have been

Petitioners appealed the district court's ruling with respect to Rule 60(b)(4), and the court of appeals affirmed. See *United States* v. *Krilich*, 209 F.3d 968 (7th Cir. 2000) (*Krilich IV*). The court of appeals explained that, even if petitioners were correct in arguing that the pertinent wetlands fell outside the scope of federal regulatory authority under the CWA, such a defect in the government's enforcement action would not deprive the district court of subject matter jurisdiction and thus would not render the judgment "void" within the meaning of Rule 60(b)(4). *Id.* at 972-973. This Court denied petitioners' petition for a writ of certiorari. See 531 U.S. 992 (2000).

3. In February 2001, after this Court's decision in *SWANCC*, petitioners again moved to vacate or modify the consent decree. Petitioners alleged that all of the wetlands and open water areas on the relevant property are intrastate, nonnavigable, and isolated.[4] They argued that "the execution and enforcement of the Consent Decree by the EPA [was therefore] an *ultra vires* act and the Consent Decree was void *ab initio*."

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based solely on the filling of isolated wetlands. Neither was there any information indicating that those wetlands' only possible connection to interstate commerce was their occasional use by migratory birds.

1999 WL 182333, at *2.

[4] Petitioners submitted the affidavit of an expert witness who expressed the view that the wetlands at issue were "hydrologically isolated during significant parts of the year." Pet. App. 74a. Although the government disputed the validity of that testimony, see *id.* at 22a, the government did not submit contrary evidence because it maintained that petitioners had waived their right to litigate the factual characteristics of those wetlands by stipulating in the consent decree to their status as "waters of the United States" under the CWA.

Pet. App. 7a. Petitioners also claimed that they were entitled to modification of the decree under Rule 60(b)(5) because this Court's decision in *SWANCC* represented a change in the law warranting relief from the judgment. *Ibid.*

The district court denied petitioners' motion. Pet. App. 17a-33a (*Krilich V*). The court stated that, for purposes of deciding the present motion, "it will be assumed that the waters at issue actually are nonnavigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water." *Id.* at 22a. The court concluded that, even if petitioners could prove those factual allegations, they would not be entitled to relief from the prior judgment.

With respect to Rule 60(b)(5), the district court ruled that *SWANCC* did not represent a change in the law relevant to this case because the parties had drafted the consent decree "in light of controlling [circuit] precedent [*i.e.*, *Hoffman Homes I*] that was no less favorable to [petitioners] than *SWANCC*." Pet. App. 32a. The court stated that "[e]quity does not require that the Decree be reopened so that defendants may now litigate whether the wetlands on the property are actually isolated. Defendants chose not to do so more than eight years ago and the legal framework has not changed in a manner that would justify doing it today." *Id.* at 32a-33a. The district court further explained that the government had "a colorable basis * * * for finding the wetlands subject to CWA regulation," and "a colorable basis for the wetlands being subject to CWA regulation should be enough to defeat the present *ultra vires* contention." *Id.* at 28a.

4. The court of appeals affirmed. Pet. App. 1a-16a.

The court of appeals explained that a party seeking to reopen a consent decree on the ground that "it is no

longer equitable that the judgment should have prospective application," Fed. R. Civ. P. 60(b)(5), "bears the burden of establishing that a significant change in circumstances warrants revision of the decree." Pet. App. 10a (quoting *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992)). "A party may meet the initial burden of establishing a significant change in circumstances 'by showing a significant change either in factual conditions or in law.'" *Ibid.* (quoting *Rufo*, 502 U.S. at 384). The court of appeals agreed with the district court that *SWANCC* did not constitute a significant change in the law applicable to this case for purposes of Rule 60(b)(5) because "the Consent Decree was drafted in light of a law (as enunciated in *Hoffman Homes I*) that was as favorable to [petitioners] as was the later *SWANCC* decision." Pet. App. 12a. The court of appeals concluded:

> If a party believes that the waters at issue on his own property are not properly subject to the EPA's authority, whether under the rationale of *Hoffman Homes I*, *SWANCC* or under some other theory, he should not stipulate otherwise. But that is exactly what [petitioners] did, to [their] continued dismay. [They] expressly agreed that certain waters on [their] property constituted "waters of the United States," subject to regulation by the EPA. Like most parties that enter into a settlement or plea agreement, [they] presumably made a tactical decision that the terms of the Consent Decree were more favorable than the costs or risks of continued litigation. Accordingly, we conclude that *SWANCC* effected no relevant change in decisional law such that the district court should have modified the Consent Decree. Nor does *SWANCC* establish that

> the EPA's entry into and continued enforcement of the Consent Decree are *ultra vires* acts. "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in . . . litigation."

Pet. App. 14a-15a (quoting *Rufo*, 502 U.S. at 389).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Federal Rule of Civil Procedure 60(b) provides that, under specified circumstances, the court "may" relieve a party from a final judgment "upon such terms as are just." "Rule 60(b), which authorizes discretionary judicial revision of judgments * * *, does not impose any legislative mandate to reopen upon the courts, but merely reflects and confirms the courts' own inherent and discretionary power * * * to set aside a judgment whose enforcement would work inequity." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 233-234 (1995). To provide a basis for relief from judgment under Rule 60(b)(5), a party must demonstrate "a significant change either in factual conditions or in law." *Rufo*, 502 U.S. at 384. The court of appeals correctly held that petitioners had failed to satisfy that standard.

In negotiating and drafting the consent decree in the instant case, the parties treated the decision in *Hoffman Homes I*, which had held that isolated wetlands lie outside the coverage of the CWA, as controlling circuit precedent. Thus, Paragraph 20A of the consent decree provided that petitioners' obligations under the decree

would not extend to specified wetland areas unless the decision in *Hoffman Homes I* was "reversed." Pet. App. 39a. The parties stipulated that the remaining wetlands and open water areas on the site were "waters of the United States" covered by the CWA. *Ibid.*

By agreeing to that stipulation, petitioners voluntarily waived their right to litigate any factual or legal issues that may have existed concerning the application of the CWA to the wetlands and open water areas covered by the consent decree. See *Krilich IV*, 209 F.3d at 972; cf. *New Hampshire* v. *Maine*, 532 U.S. 742 (2001) (party was judicially estopped from asserting a position in a subsequent proceeding contrary to the position it agreed to in a consent decree entered by the court in the same case). In return, petitioners received the substantial benefits associated with settling the enforcement action against them, including finality and repose and avoidance of the costs of litigation. "Like most parties that enter into a settlement or plea agreement, [petitioners] presumably made a tactical decision that the terms of the Consent Decree were more favorable than the costs or risks of continued litigation." Pet. App. 15a.

Ten years after agreeing to that stipulation, petitioners seek to introduce evidence that none of the wetland and open water areas covered by Paragraph 17 of the consent decree have a sufficient connection to navigable-in-fact waters to support the exercise of federal regulatory authority. The court of appeals correctly held that "*SWANCC* effected no relevant change in decisional law such that the district court should have modified the Consent Decree," Pet. App. 15a, because the rule of law announced in *SWANCC* was not meaningfully different from the rule previously

announced by the Seventh Circuit in *Hoffman Homes I*. Petitioners do not even cite *Hoffman Homes I*, let alone attempt to explain how this Court's decision in *SWANCC* represented a sufficient departure from the Seventh Circuit's prior analysis to provide a basis for relief from judgment under Rule 60(b)(5).[5]

The only other court of appeals to address a post-*SWANCC* effort to reopen a CWA Section 404 consent decree reached the same conclusion as did the court below. See *United States* v. *Interstate Gen. Co., L.P.*, 39 Fed. Appx. 870 (4th Cir. 2002) (*IGC*). *IGC* involved both a motion under Rule 60(b)(5) to reopen a civil consent decree and a motion for a writ of coram nobis to set aside a criminal plea agreement. *Id.* at 871. As in this case, the parties in *IGC* entered into negotiated agreements in light of circuit precedent that had held isolated wetlands to be beyond the scope of federal regulatory authority under the CWA. *Id.* at 873; see *United States* v. *Wilson*, 133 F.3d 251, 256-257 (4th Cir. 1997). In light of that circuit precedent in effect at the time the parties entered into the consent decree, the court of appeals in *IGC* concluded that "*SWANCC* effected no relevant change in decisional law in this circuit," and it affirmed the district court's denial of the defendants' motions. 39 Fed. Appx. at 874.

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[5] Although the judgment in *Hoffman Homes I* was vacated and the initial panel opinion was superseded by the opinion in *Hoffman Homes II*, the district court in *Krilich I* specifically held that *Hoffman Homes I* had not been "reversed" within the meaning of Paragraph 20A of the Consent Decree. 948 F. Supp. at 725; see Pet. App. 5a-6a. That holding substantially benefitted petitioners, since it meant that their obligations under Paragraph 17 of the decree did not extend to the wetland areas specifically identified in Paragraph 20A.

2. Petitioners seek review of the question "[w]hether the court of appeals erred in holding * * * that the federal government has the statutory and constitutional authority to regulate non-navigable, isolated wetlands that have no surface connection to the nearest stream or nearest navigable body of water." Pet. i (internal quotation marks omitted). The instant case does not present that question, however, because the court of appeals did not issue the holding that petitioners attribute to it. The court of appeals did not construe the term "waters of the United States" to encompass isolated wetlands lacking a surface connection to navigable-in-fact waters, and it did not suggest that the federal government could exercise regulatory authority over such wetlands in the face of a timely challenge to the assertion of federal power. Rather, the court simply held that petitioners had identified no relevant change in fact or law since the entry of the Consent Decree, and that petitioners were therefore bound by their prior stipulation that the wetlands at issue here are "waters of the United States" within the meaning of the CWA.

Petitioners are also wrong in suggesting (Pet. 9) that the courts of appeals are "deeply divided" over the scope of federal regulatory authority under Section 404 of the CWA. Since this Court's decision in *SWANCC*, only two courts of appeals have squarely addressed whether particular water bodies are "waters of the United States." In *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), the court of appeals held that the plaintiff had failed to establish that a seasonal creek with a questionable surface water connection to the nearest navigable-in-fact water body qualified as a "water of the United States" under the Oil Pollution

Act (OPA).[6] See *id.* at 270-271 (noting the lack of record evidence as to the characteristics of the creek in question, including "whether the creek ever flows directly (above ground) into the Canadian River"). In *Headwaters, Inc.* v. *Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), the court of appeals concluded that certain nonnavigable, man-made canals that had a direct surface connection to other "waters of the United States" were subject to regulation under the CWA as "tributaries" of navigable-in-fact waters. *Id.* at 533-534; accord *Community Ass'n for Restoration of the Env't* v. *Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002). The holdings of those decisions are not inconsistent with each other, and neither decision in any way conflicts with the Seventh Circuit's ruling in the instant case, which rested on the distinct ground that petitioners had not established a change in the law warranting reopening of the consent decree.

3. Petitioners contend (Pet. 19-26) that the Consent Decree at issue here should be treated as void *ab initio* on the ground that the relevant wetlands lie outside federal regulatory authority under the CWA. Petitioners assert (Pet. 22) that "where a government's execution of a contract constitutes an *ultra vires* act, the contract itself is void *ab initio* and has no legal effect." Petitioners do not and could not plausibly contend, however, that the federal government lacks authority to negotiate voluntary settlements of CWA enforcement actions. The instant case is therefore readily distinguishable from cases in which the invalid-

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[6] The court in *Rice* held that Congress generally intended the terms "navigable waters" and "waters of the United States" to have "the same meaning in both the OPA and the CWA." 250 F.3d at 267.

ity of the relevant government contract is apparent on the face of the agreement. Petitioners also cite no case suggesting that the question whether particular geographic areas are "waters of the United States" cannot be the subject of a legally binding stipulation between the parties.

Under petitioners' theory, the district court was required to conduct a potentially time-consuming inquiry into the physical characteristics of the relevant waters, notwithstanding petitioners' prior litigating decision to enter into a negotiated settlement rather than contest EPA's assertion of regulatory authority. Petitioners seek to escape the effects of their prior stipulation, moreover, even though they can identify no change in either the facts or the law bearing on the propriety of federal regulatory authority. Petitioners' theory has no basis in precedent and would, if accepted, substantially complicate efforts to achieve consensual resolution of federal enforcement actions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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